SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 142.

JOHN SWENDIG, JAMES W. MILLER, REMIGUS GRAB, ET AL., APPELLANTS,

vs.

THE WASHINGTON WATER POWER COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR APPELLANTS.

JAMES F. AILSHIE,
Attorney and Solicitor for Appellants.

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We desire to submit a brief reply to some of the contentions made in appellee's brief and call attention to the authorities cited therein.

The Circuit Court of Appeals in its opinion says:

> "It is conceded—or seems to be conceded, by counsel for the appellants, that had the patents in terms excepted the permits that had been theretofore granted

> by the Secretary of the Interior in pursuance of the act of Congress that has been referred to, the previously existing rights of the appellee would not have been affected."

This is quoted in appellee's brief in this court apparently for the purpose of conveying the idea that we have made an important admission which militates against our contention. In our petition for a rehearing we called the court's attention to this statement and said:

> "The court must have misapprehended the position we have taken as we have never intended to concede or seem to concede that it was ever within the power of the Secretary of the Interior to have issued a fee simple patent to this tract of land and at the same time to have reserved this license or permit right to either the government or the appellee. Under the land laws as enacted by Congress and the proclamation of the President extending them to the Cœur d'Alene Indian Reservation it became the absolute duty of the land department to either issue patents to these homesteaders upon their complying with the homestead laws or refuse to issue them. Congress had already told the Secretary, and everyone else, that any permits issued under the Act of February 15, 1901, *'shall not be held to confer any right or easement or interest in, to or over any public land.'* "

In the case at bar the Department made no attempt at noting any reservation, and indeed we do not think it was the intention of the Department at the time to reserve this right to appellee, but we believe and so contend that the Department *had no right* and never had a right to issue a patent to a homesteader and at the same time reserve from the lands

patented an easement or right of way for the purposes for which appellee had secured this permit. The Congress, in the passage of the Act of February 15, 1901, was dealing solely with lands while they retained the character and status of "public lands, reservations and parks." When this land ceased to be public land and passed into private ownership under the homestead laws, it passed out from under the operation of the Act of February 15, 1901. By the Act of June 22, 1906, Congress directed the President to cause the Cœur d'Alene Indian Reservation to be surveyed and allotted to the Indians and directed that all land remaining in that reservation after the allotments should thereupon by proclamation of the President be thrown open to entry under the general homestead laws of the United States. After these lands were opened to settlement under the proclamation of the President it became the duty of the Department to issue patents to entrymen who complied with the law and earned the lands. It was not within the power of any department of government to make any reservations in the patents so issued except as directed and prescribed by Congress.

A letter from the Secretary of the Interior dated August 23, 1912, is cited and relied upon by appellee, wherein the Secretary attributes to Congress a purpose in the passage of the act in question, which to us seems entirely contrary to the express declaration of the act.

He says: "To effectuate the purposes of the statute, it is necessary too that a permit once given should be *superior to the rights of a subsequent patentee of the land,*" but Congress said that it *"shall not be held to confer any right or easement or interest in, to or over any public land, reservation*

or park." What right had the Secretary to say this where Congress had said otherwise?

The language of the act is plain, simple and direct and is not open to construction and is repugnant to the intent attributed to it by the Secretary. The weakness of the position of the Secretary is well illustrated by the reach he has made for the Act of August 30, 1890.

In this act it is provided that in all patents for lands thereafter, taken under any of the laws of the United States, etc., it shall be expressed in the patent that there is reserved from the lands in said patent described a right of way therein for "ditches or canals constructed by the authority of the United States."

The Act of August 30, 1890, was passed to save the Government from having to acquire rights of way over lands thereafter patented in cases where the Reclamation Department desired to do reclamation work and construct ditches and canals, but has no application whatever to a permit right granted to some one else to construct canals.

The files of the Interior Department, in Nye *vs.* Washington Water Power Co., show that on June 3, 1910, and about one month after the opening of the Coeur d'Alene Indian Reservation the entryman wrote the Secretary of the Interior as follows:

> "In the recent opening of the Coeur d'Alene Reservation, Idaho, I filed on a piece of land along the St. Joe River, and was informed in the land office at Coeur d'Alene that it was subject to the rights of the Washington Water Power Company. I should like to get a statement from the Department as to what the rights of the Washington Water Power Company are

on the premises. I can not afford to leave my position here and move out there, only to find out that the land is not suitable for farming and impossible to obtain clear title to. It means a great deal to me to get the straight of this, and I hope you will deem it proper to furnish the statement. Yours truly, John A. Nye. My filing is on lots 17-13-11 and 9, township 46, 5.3, Sec. 3."

and that under date of July 28, 1910, the Acting Commissioner of the General Land Office replied as follows:

"I am in receipt of your letter of June 3, 1910, in which you state that you filed on a piece of land in the former Coeur d'Alene Indian Reservation, which, you state, is subject to the rights of the Washington Water Power Company, and ask to be informed as to the nature of the rights of the company over the land.

"The records of this office show that on July 27, 1902, the Washington Water Power Company was given permission to use a right of way 100 feet wide through the Coeur d'Alene Indian Reservation for the power transmission line, under the Act of February 15, 1901. Permission granted under the act is in the nature of a license, revocable at any time, no easement or fee being granted. Paragraph 43 of the regulations under which the permission was allowed, reads in part:

" 'The final disposal by the United States of any tract traversed by the permitted right of way is, of itself, without further act on the part of the Department, a revocation of the permission so far as it affects that tract.'

"On the issuance of the patent to the land on which you have filed, the permit is revoked, *ipso facto*, as far as the same affects the land conveyed by the patent,

and a clear title to the entire tract will pass to the patentee.

Very respectfully,

S. V. PROUDFIT,
Acting Commissioner."

This regulation was at the time reported in the Land Decisions (31 L. D., 17), and the printed regulation was evidently on file in every Land Office.

The Constitution, Section 3, Article IV, provides that—

> "Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or the property belonging to the United States.
>
> "This is the supreme law of the land and embodies an express grant of power to the national government. * * * It has been construed to mean that title and rights in and to the public lands are created by the acts of Congress and must be governed by their provisions whether they be hard or lenient and that no rights whatever can be obtained in the lands of the United States except as Congress may consent."
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> *Light vs. United* States, 220 U. S., 537; 55 L. Ed., 570; Rector *vs.* Ashley, 6 Wall., 142; 18 L. Ed., 733; Jordan *vs.* Barrett, 4 Haw, 184; 11 L. Ed., 924.

U. S. vs. Utah P. & L. Co. 209 Fed. 557

We believe the cases cited by counsel for appellee at pages 15 to 18, inclusive, of their brief will be found not to support their contentions in this case.

United States *v.* Moore, 95 U. S., 760, cited by appellee, was a case involving the status of an assistant surgeon in the Navy. There were two inharmonious statutes dealing with the qualifications and right of advancement for such offi-

cers. The court observed that the construction given to a statute by those charged with the duty of executing it is always entitled to a most respectful consideration, but the case was not determined upon that point. In concluding the opinion the court said:

> "In cases like this, the construction should be such that both provisions, if possible, may stand. The clause in question was obviously as much intended to have effect as the section with which it is in seeming conflict. It may well be held to be an exception, though not so expressed, to the universality of the language of the latter. This obviates the difficulty, harmonizes the provision, and gives effect to both."

In Heath *vs.* Wallace, 138 U. S. 573, cited by counsel, the question arose as to whether "Lands subject to periodic overflow" were "swamp lands" within the meaning of the Swamp Land Grant made to the State of California by Act of September 28, 1850. The Department caused an investigation to be made by the Surveyor General, and upon the facts held that *the land was not swamp land.* The court held that the findings by the Department were conclusive on such question, and cited with approval U. S. *vs.* Moore, *supra.* It will be observed that this line of authorities (and there are many cases to the same effect), simply holds that findings of fact on Departmental matters within the jurisdiction of such Department will not be disturbed by the courts, and that where a statute is ambiguous, indefinite, or easily capable of different constructions, the courts will not disturb a construction which has been adopted and acted upon by the Department.

Stoddard *vs.* Cahmbers simply holds that a patent issued

for lands *reserved from sale by law are not public* lands or subject to sale, and that such patent is simply void. Neither the facts nor the law discussed in that case have any bearing or throw any light upon the case at bar. Here the land patented to appellants was *public and subject to entry and sale.*

Jamestown & Northern R. R. Co., *vs.* Jones, 177 U. S., 125, cited by counsel, is dealing with the Act of 1875 granting a right of way through public lands to railroad companies, and holds that a definite location of the right of way of a railroad is sufficiently made by the actual construction of the road upon the ground although no profile map was ever filed. This case in no way affects the case at bar or throws any light on it.

The case of Smith *vs.* Townsend, 148 U. S., 490, is a case determining the right of one who was within the territorial limits of Oklahoma Territory at the hour of noon, April 22, 1889, to take a homestead under the act throwing that Territory open to homestead entry, and holds that such a person was disqualified to make an entry.

The Act of June 21, 1906 (34 Stat. at Large, 335), provided for the opening of the Cœur d'Alene Indian Reservation and allotment of lands to each man, woman and child belonging to the Indian tribes, and that the "residue or surplus lands should be opened to settlement and entry under the provisions of the homestead law," and that the money to be derived from the disposition of these lands should be turned into the fund and credited to "the Cœur d'Alene and Confederated Tribes of Indians." *Up to this time neither the Government nor the Indian tribes had received any compensation whatever from plaintiff for an easement or right of way through the Cœur d'Alene Indian Reservation for elec-*

trical power purposes. When the tracts were disposed of to defendants *they purchased and paid for the entire acreage, including the right of way now claimed by plaintiff.* If plaintiff is to continue to occupy and use this right of way *without paying* "just compensation" therefor under the laws of the State of Idaho providing for condemnation of easements, then, of course, *it will be getting its entire right of way through this land free,* and defendants, on the other hand, will have paid the Government, for the benefit of the Indian tribes, the full value thereof, and will still have to pay taxes thereon and permanently lose the use of this 100-foot strip through their farms. It will have acquired a right of way, it now values at $25,000.00 (Tr., 14), for nothing, whereas another light or power company going into the same Territory at any time since the opening of this reservation and patenting of lands to homesteaders would have to purchase or condemn a right of way for like purposes.

We respectfully submit that the judgment should be reversed.

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Attorney and Solicitor for Appellants.